United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,794

392

M. WHARTON YOUNG,

Appellant

v.

PICK HOTELS-WASHINGTON CORPORATION,
A Corporation

and

LEE HOUSE, INC.,
A Corporation,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Was an amended complaint naming two new parties-defendant properly dismissed because of the running of the Statute of Limitations where the new parties had notice of the original suit within the statutory period, their present attorneys were the attorneys throughout the history of the suit, and where such an amendment was permitted by the 1966 Amendment to Rules 15 (c) of the Federal Rules of Civil Procedure?

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia granted the motion of appellees to dismiss the amended complaint as to them and the cause was finally dismissed as to the appellants. The order of dismissal was entered on January 24, 1968 and Notice of Appeal was filed on February 21, 1968. The case is properly in this Court.

STATEMENT OF THE CASE

Appellant, M. Wharton Young, a doctor of medicine, was invited to appear before the Anatomical Meeting in Chicago, Illinois on or about March 21, 1961. The Pick-Congress Hotel in Chicago, which the amended complaint filed on July 26, 1967, alleged belonged to and affiliated with appellees, was selected as headquarters for the meeting. Appellant accepted the invitation.

Appellant consulted the classified directory of the Chesapeake and Potomac Telephone Company and found on page 519 the Albert Pick Hotels, Washington Sales Office, 15th & L Streets, N.W. had advertised free reservations by telephone or teletype. at listed Albert Pick Hotels. The Pick-Congress of Chicago was one of the hotels illustrated in the advertisement. Appellant made a reservation at the Pick-Congress Hotel in Chicago by calling the telephone number listed in the advertisement - DI 7-4800.

Appellant alleged in the amended complaint filed July 26, 1967 that when he arrived at the Pick-Congress Hotel he was denied accommodation by reason of his color - appellant being a Negro. Further that his luggage was lost through the negligence of appellees - that such luggage contained not only his clothing but valuable research papers and slides which could not be duplicated.

Appellant's amended complaint alleged negligence, violation of civil rights, malicious and wilful conduct, humiliation and embarrassment, irreparable injury and contained prayers for punitive, as well as compensatory damages against each of the

appellees.

Appellees filed a Motion to Dismiss alleging that as to them, being sued for the first time, the Statute of Limitations has run. The Court below granted the motion and dismissed the amended complaint as to them.

STATUTES INVOLVED

Rule 15 (c) of the Federal Rules of Civil Procedure, provides:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action and that he is not prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

STATEMENT OF POINTS

1. The Court below erred in dismissing the amended complaint against the appellees.

SUMMARY OF ARGUMENT

Appellant contends that naming of appellee corporations in the amended complaint, even though the Statute of Limitations had run, was permitted by virtue of Rule 15 (c) of the Federal

Rules of Civil Procedure, where it appears that the same attorneys have appeared throughout the proceedings who represent appellees and where it appears that appellees have been on notice of the pendency of this litigation.

ARGUMENT

This action is before this Court for the third time. In Young v. Albert Pick Hotels, 115 U.S. App. D.C. 400, 320 F.2d 719, the issue concerned the standing of a Delaware corporation, not named as a party defendant, to move to quash service, and evidence of an Illinois corporation doing business in the District of Columbia. In the second case, Young v. Albert Pick Hotels, 126 U.S. App. D.C. 155, 375 F.2d 331 the issue concerned attempted service upon a person which was not binding upon the defendant.

On July 26, 1967, counsel for appellant below at that time filed an amended complaint naming as defendant the appellees and alleging that the appellees were affiliated with or owned the Pick-Congress Hotel in Chicago, Illinois. Appellees filed a motion to dismiss the complaint on the ground that the statute of limitations barred an action as to them. The injuries and damages complained of were alleged to have occured in 1961.

Appellant submits that the issue concerns whether under the 1966 amendment to Rule 15 (c) of the Federal Rules of Civil Procedure the substitution of appellees as parties defendant was permissible even though the Statute of Limitations had expired in point of time.

In Marino v. Gotham Chalkboard Mfg. Corp., USDC, DSD NY 1966, 259 F.Supp. 953, at page 954, it was stated:

> ". . .The new amendment focuses not on semantics, but on the simple question of whether the party to be brought in had fair notice of the action, whether he will be prejudiced in maintaining his defense on the marits, and whether he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have brought against him."

In United States of America, et cet. v. Travelers Insurance Company, USDC Colo. 1966, 40 FRD 316, it was stated at 317:

> "Rule 15 grants the Court liberal discretion with respect to amendments. However, when leave is sought to amend by substituting a party, the scrutiny must be more careful. Seemingly, the courts look to relationship between the old and new party, whether the new party has been on notice of the suit and whether substantial prejudice is apt to result. . ."

Appellant submits that it is apparent from the record itself that appellees were apprised of the suit from its inception, at least as far as Lee House, Inc. is concerned. The record shows that the same attorneys have appeared in the proceedings since its inception and with the first responsive motions. Further, that Lee House, Inc. attempted to appear specially to quash original service. This is set forth in Young v. Albert Pick Hotels, 115 U.S. App. D.C. 400, 320 F.2d 719.

Appellees motion to dismiss was predicated upon the running of the Statute of Limitations. Appellant submits that the 1966 amendment to Rule 15 (c) of the Federal Rules of Civil Procedure requires more of a showing than the running of the statute.

This is evident from a reading of the Advisory Committee Notes on Rules, set forth United States Code Annotated Title 28, Rules of Civil Procedure 12-16, on page 101 and 102 of the 1967 Cumulative Annual Pocket Part.

The important consideration is the element of notice. Did the new parties have notice, formal or informal, of the suit. Further, would it be unfair to bar appellant's claim. All of these considerations are treated in an excellent opinion by the U.S. District Court for the Southern District of California, Central Division, 1966 in the case of Meredith v. United Air Lines, et al., 41 F.R.D. 34.

The suit involves the Pick Hotels. The appellees are part of the Pick Hotel chain. Throughout the proceedings the same counsel for appellees, herein, appeared in prior proceedings in this case.

It is obvious that present appellees had notice of the pendency of this litigation and are not now surprised by the issues raised.

In view of the liberal amendment to Rule 15 (c) of the Federal Rules of Civil Procedure, appellant submits that the amended complaint should not have been dismissed as to appellees herein.

CONCLUSION

Wherefore, the premises considered herein, the judgment of the Court below dismissing the amended complaint as to appellees herein should be reversed with direction to reinstate the amended complaint.

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BRIEF FOR APPELLEES

STATEMENT OF ISSUES

In the opinion of Appellees, the question presented is whether the lower Court properly dismissed an action because it was not filed within the time permitted by the Statute of Limitations.

COUNTER-STATEMENT OF THE CASE

The incident upon which this law suit is based occurred in 1961. Suit was first filed against Albert Pick Hotels in 1962. (App - 1). It was not until 1967, long after the expiration of the Statute of Limitations that Appellant first sued Appellees herein, Pick Hotels–Washington Corporation and Lee House, Inc. by filing a so-called "Amended Complaint" which dropped the original defendant. (App - 11).

Appellant sued herein for alleged mistreatment in Chicago, Illinois, by the Pick-Congress Hotel. He first filed his complaint naming as the sole defendant Albert Pick Hotels, with issuance of service of process upon the Pick-Lee House, 15th and L Streets, N.W., Washington, D.C. Summons and Complaint were left with an employee of Pick-Lee House with return made thereon.

Thereafter, in 1962, by special appearance, the named defendant moved to quash service of Summons and Complaint and supported its Motion with an uncontradicted Affidavit executed by Morrison Worthington, Assistant Secretary of the Pick-Congress Corporation, the operator of the Pick-Congress Hotel located in Chicago, Illinois, wherein it was stated that Lee House, Inc., a Delaware Corporation doing business as the Pick-Lee House at 15th and L Streets, N.W., Washington, D.C., was not a subsidiary or parent corporation of the Pick-Congress Corporation nor of the Central Hotel Company, an Illinois Corporation, the owner of the Pick-Congress Hotel, in Chicago, Illinois. (App - 16). Appellant was thus informed soon after he filed his first complaint in 1962 as to the identity of the entities against whom suit would have to be brought.

Mr. Worthington further stated that no authorization or authority of any nature had ever been given to Lee House, Inc. or its employees to act as agents on behalf of the Central Hotel Com-

pany or the Pick-Congress Corporation for the purpose of acceptance of service of process.

Likewise, the Affidavit of Edward Sheehe, manager of the Pick-Lee House was filed in 1962 in support of the Motion to Quash. It stated that the Pick-Lee House was owned and operated by Lee-House, Inc., a Delaware Corporation and that he was without authority to act as agent for that or for any other corporation for the acceptance of service of process. Further, that Richard Frank, his Assistant Manager, also had no authority to accept service of process for any corporation. (App - 17).

On June 19, 1962, the lower Court entered an Order quashing service of process, (App - 19). On Appeal, this Court found that valid service had not been made on the named defendant and that service of process had been attempted on the wrong party, but remanded the case to the lower Court for the purpose of permitting Appellant to introduce evidence in an attempt to show that the Illinois Corporation was doing business in Washington, D.C., so as to render it subject to service of process. *Young v. Albert Pick Hotels*, 115 U.S. App.D.C. 400, 320 F.2d 719.

Following reversal and on February 3, 1964, Appellant filed an Amended Complaint, again naming only Albert Pick Hotels to which a Motion to Quash service of process was filed. On August 6, 1964, before a ruling was had on the Motion to Quash, Appellant filed a Second Amended Complaint and again named only Albert Pick Hotels as defendant. (App - 6). On August 3, 1965, the lower Court entered an Order granting the Motion to Quash Service of the Summons and Amended Complaint. This Court, on February 23, 1967, affirmed the lower Court, holding that the Assistant Manager of Pick-Lee House, the person attempted to be served, was not an employee of defendant nor was he or Pick-Lee House an agent of

defendant upon whom service binding upon defendant could be made. *Young v. Albert Pick Hotels.* 126 U.S.App.D.C. 155, 375 F.2d 331.

Thereafter, Appellant sought to have the same named defendant served by having a copy of the Summons and Second Amended Complaint delivered to Roger Duke, Auditor of Pick Hotels–Washington Corporation and on June 30, 1967, service of process was again quashed. (App -19).

No Appeal was taken from this Order but on July 26, 1967, Appellant filed a so-called "Amended Complaint" dropping Albert Pick Hotels as a defendant and naming for the first time as defendants the Appellees herein, Pick Hotels–Washington Corporation and Lee House, Inc. (App - 11). Liability of Appellees as set forth in the third Amended Complaint was based on the allegation that the Pick-Congress Hotel in Chicago where Appellant's grievance allegedly occurred belonged to and was affiliated with Appellees, the new defendants who had not previously been sued.

On January 24, 1968, Appellees' Motion to Dismiss based upon the expiration of the Statute of Limitations was granted and this Appeal followed.

SUMMARY OF ARGUMENT

The Statute of Limitations bars Appellant's claim against Appellees. It provides that an action of this nature must be brought within three years of the time it accrues. Appellant's claim arose in 1961. Suit was not instituted against Appellees until 1967.

Rule 15(c) of the Federal Rules of Civil Procedure, does not authorize or permit this action to be brought against Appellees many years after the Statute of Limitations expired. Appellant has given not one valid reason for the application of Rule 15(c). In 1962 Appellant was notified by the Affidavit of Morrison Worthington, Assistant Secretary of the Pick-Congress Hotel as to the identity of the

owner and operator of the Hotel and that Lee House, Inc. was neither a subsidiary or parent corporation of the Illinois Hotel where Appellant's alleged cause of action arose.

Neither then nor since has Appellant sought to institute suit against the proper entity. Nor has Appellant complied with the necessary requirements of Rule 15(c). The institution of the suit in 1962 against Albert Pick Hotels for an occurrence in the State of Illinois did not eliminate the prejudice to Appellees when they were sued many years later. While the record does not establish satisfactory notice of the original suit, to Appellees herein, even if it had, Appellees would have had no reason to believe that they would later be sued because the alleged tort occurred in Illinois and did not in any way involve them. No mistake concerning the identity of the proper party occurred here and Appellees could not possibly have anticipated that this action would have been brought against them.

Even if the Statute had not run, Appellant's allegations will not permit him to maintain his action against Appellees herein.

ARGUMENT

A. Rule 15(c) Does Not Permit the Bringing of this Action.

Appellant bases his appeal solely on the claim that Rule 15(c) of the Federal Rules of Civil Procedure permits the "substitution of Appellees as parties defendant . . . even though (Appellant admits) the Statute of Limitations had expired in point of time." This is not a substitution but a dropping of a party before the Court from 1962 to 1967 and the filing of a suit against two brand new corporate defendants. Rule 15(c) was clearly not meant to apply to the situation herein and there is no possible basis to Appellant's contention.

It is clear from the uncontradicted record that Appellee Lee House, Inc. neither was affiliated with, or belonged or had any relationship to the Central Hotel Company, the owner of the hotel where Appellant's alleged cause of action arose or the Pick-Congress Corporation, the lessee operator. Pick Hotels–Washington Corporation was not mentioned in the protracted litigation until it was sued in 1967, long after the Statute of Limitations had expired.

Rule 15(c) demands a showing that, within the period of limitations, the new party "has received such notice of the institution of the action that he is not prejudiced in maintaining his defense on the merits" and that he "knew or should have known that, but for a mistake concerning the identity of the proper party", he would have been brought into the proceedings earlier. The fact that an employee of Appellee Lee House, Inc. in 1962 submitted an Affidavit in support of the first Motion to Quash did not constitute notice to this Appellee of the institution of an action which might involve it, since an incident involving a completely different corporation and an occurrence in Illinois was involved. Appellee Pick Hotels–Washington Corporation, of course, was never mentioned in the record until suit was filed against it in 1967. Nor was there any basis for a claim that Appellees knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against them. There was no mistake here on the part of Appellant, he was on notice as to the ownership and operation of the Illinois Hotel in 1962, took no action to sue those parties, and finally in 1967, erroneously and much too late, sued Appellees herein.

Appellant cannot claim an excusable neglect here or that Appellees or anyone else misled or lulled him into a belief that he had sued the right defendant when he had not, or that the party originally sued and the parties Appellant meant to sue had sufficient

"identity of interest" or were so closely connected that notice to one should suffice to inform the other of a pending claim for relief.

The pleadings and affidavits in the record clearly demonstrate that Appellant was on notice as early as 1962 as to the ownership and operation of the Hotel where his cause of action arose and that Appellees were in no way connected therewith.

Appellant can point to nothing in the record to show notice to Pick Hotels–Washington Corporation of the institution of the 1962 suit and it is clear Appellee Lee House, Inc. could not be held responsible for the occurrence in Chicago.

To permit Appellant to sue Appellees would deprive them of their defense of the Statute of Limitations, apart from the fact that there is no basis for suing them. Appellants were not misled, they could have sued Appellees at any time. Justice does not now require this Court to permit Appellant to sue Appellees. There is no basis for such action.

Appellant cites 3 cases in support of his argument. None seem applicable or relevant to this case. *Marino v. Gotham Chalkboard Mfg. Corp.*, 259 F.Supp. 954, involved "small New York corporations with identical organizers, officers and directors. Both have identical offices. The identity of management established that notice to one was notice to the other corporation." This is not the situation here.

United States of America ex rel Construction Specialties Company v. Travelers Insurance Company, 40 F.R.D. 316 (D. Colo. 1966), is not the final word on this case but the Tenth Circuit Opinion following its appeal is. In *Travelers Indemnity Co. v. U.S.*, 382 F.2d 103 (1967), which affirmed sub nom the 30 F.R.D. district court opinion, it is again found that the facts have no application herein, and involved a misnomer and a concealment of corporate identity which is lacking here. The Court in that case made clear

that the rights of the added party, as well as the amending party must be considered and said this:

> "The exercise of discretion in this area necessarily involves concern for the rights of the amending party; but the rights of the amended party cannot be ignored. Indeed the very purpose of the 1966 Amendment to Rule 15(c) is the protection of added party's rights by enumerating the conditions which must be satisfied before relation back of the amendment will be allowed.
>
> "Even though the conditions are explicitly stated in Rule 15(c) only because of the 1966 Amendment, the history, intent and purpose of the federal rule will not allow a conclusion by this court that the pre-1966 Rule 15(c) demands a different interpretation. The 1966 Amendment simply clarifies, by explicitly stating the permissive procedure and its appropriate safeguards which have existed under Rule 15(c) since its promulgation."

Rule 15(c) is not intended to cover a situation where entirely new parties have been added to the litigation after an apparent abandonment of Appellant's original party of record in the original Complaint as occurred here. It has long been recognized that the "relation back" doctrine of 15(c) does not enable a plaintiff to join entirely new parties as defendants after the Statute of Limitations has run.

Storey, et al v. Garrett Corporation, 43 F.R.D. 304 (1967) points out:

> "Plaintiffs seek to avoid the effect of the foregoing rule by reliance on the 'relation back' doctrine of Rule 15(c) of the Federal Rules of Civil Procedure. Such reliance cannot be justified. It has long been recognized that the 'relation back' doctrine does not enable a plaintiff to join entirely new parties as defendants after the statute of limitations has run.

Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Lewis v. Lewis, 358 F.2d 495 (9th Cir. 1966). The 1966 Amendment liberalizing Rule 15(c) has not changed this basic premise. King v. Udall, 266 F.Supp. 747, 748-749 (D.C. 1967) Advisory Committee Note, 28 U.S.C.A. Rule 15, 1966 Supp. at 83.

"The specific requirements now set out in Rule 15(c) are designed to assist the court in determining whether a particular party is 'new' within the meaning of the foregoing cases. One of those requirements, and the only one which need be considered for purposes of this motion, is that '* * * the party to be brought in by amendment * * * (2) *knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.* * * *'

* * *

"The second clause of Rule 15(c) requires more than a mere 'mistake concerning identity.' It requires that the party to be brought in by amendment *knew or should have known* of the existence of that mistake."

The clear language of *Storey*, supra, points up that Rule 15(c) cannot be used by Appellant here.

In situations where a new party is added, unlike the misnomer situation where Rule 15(c) permits amendment, even the liberalized Rule 15(c) will not allow relation back. In *King v. Udall*, 266 F.Supp. 749 (1967) it is said:

"It is a well established principle that ordinarily a new party brought in subsequent to the commencement of an action may interpose a defense of statute of limitations even if it arose subsequently to the initial institution of the original action but prior to the

> bringing in of parties seeking the advantage of the defense."

Meredith v. United Air Lines, 41 F.R.D. 34, is likewise completely inapposite and points up the complete lack of support for Appellant's position. The problem there was the addition of another party, Lockheed, after the Statute of Limitations had run. Much was made of the fact that Lockheed had already participated in hearings, had filed affidavits in connection with the crash, and that "Lockheed also knew or should have known 'that, but for a mistake concerning the identity of the proper party, the action would have been brought against (it)."

Applied to our own case, the question is whether Lee House, Inc. and Pick Hotels–Washington Corporation should have known that they might be sued for a tort which occurred in Chicago and in connection with another hotel in the chain. There can be no possible basis for claiming that they did. There was no misnomer or mistake here and Appellees cannot be sued at this late date. Since the alleged tort occurred in Chicago involving another corporation, neither of Appellees here would be justified in thinking that "but for a mistake concerning the identity of the proper party, the action would have been brought against him." (F.R.C.P. Rule 15(c) (2).) In this case, it is important also to note that Appellees are completely different entities from the Illinois Corporations.

In *Jacobs v. McCloskey and Company*, 40 F.R.D. 489 (1966), decided after the new rule came into effect, the court was specially concerned whether a *new* party was involved, and said:

> "It is clear that amendments under Rule 15(a) may, in the court's discretion be granted on terms. This provision is designed to avoid or to minimize any prejudice which might otherwise result. Rossi v. McCloskey & Co., 149 F.Supp. 683 (E.D. Pa. 1957); Witcjak v. Allen, 22 F.R.D. 330 (E.D. Pa. 1958). To

> grant the terms here requested would in substance permit the plaintiff to amend his complaint to the prejudice of the prospective defendant, First Penco Realty, Inc. Plaintiff would have us bring into this action a completely different entity, First Penco Realty, Inc., who would thereafter be deprived of its defense of statute of limitations, assuming the amendment would relate back.
>
> "It is unnecessary to discuss further the authorities offered by the plaintiff, as they are readily distinguishable and are of little help to him. As my colleague, Judge Harold K. Wood, observed in Graeff v. Borough of Rockledge, 35 F.R.D. 178 (E.D. Pa. 1964): 'This motion seeks more than a simple amendment to correct error in the caption. It seeks to bring in a new party to the action by adding a corporate defendant not previously a party to the suit.'"

It will thus be seen that there is a complete lack of compliance with the necessary requirements of Rule 15(c) which was not meant to apply to the situation here.

B. The Corporate Identities Are Separate and Distinct

The corporate identities of Appellees and the Illinois Corporations are separate and distinct and there is no basis for Appellant's statement that "This suit involves Pick Hotels. The appellees are part of the Pick Hotel chain." The allegations in the Complaint do not make Appellees responsible for the Illinois incident.

In *Fitzgerald v. Hilton Hotels Corp.*, 183 F.Supp. 342 (1960) where service was attempted in Pennsylvania for an injury which occurred to a Pennsylvania resident in Mexico City, the court talked of the corporate separateness of different corporations and said at page 343:

> "Every corporation has the status of a legal person and it is basic law that service upon person A does not constitute service upon person B unless A is the agent for B or unless for reasons of fairness or practical considerations, the separateness of A and B ought to be disregarded and A and B for purposes of service of process should be considered one person."

Appellant's filing of the so-called "Amended Complaint" constituted the filing of a completely new action against Appellees and it cannot be done. This is an effort to circumvent the plain meaning of the Statute of Limitations which required this action to be brought no later than 1964. What is asked is more than amendment, it is attempting to add corporate defendants "not previously party to suit". *Jacobs v. McCloskey and Company*, supra.

CONCLUSION

Rule 15(c) of the Federal Rules of Civil Procedure has no application to the facts in this case and the lower Court very properly held that the Statute of Limitations had expired and that Appellant could not maintain this action.

Respectfully submitted,

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APPENDIX

STATUTE INVOLVED

LIMITATION OF ACTIONS

D.C. Code 12-301

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(3) for the recovery of personal property or damages for its unlawful detention—3 years.

(7) on a simple contract, express or implied—3 years.

(8) for which a limitation is not otherwise specially prescribed—3 years.

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PICK-HOTELS-WASHINGTON CORPORATION, et al.,
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PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING EN BANC

Appellant, M. Wharton Young, pursuant and on reliance on Rule 40, Federal Rules of Appellate Procedure and also pursuant to Rule 35 (b) of the said Rules, moves the Court for a rehearing with a suggestion for a rehearing en banc.

A panel of this Court, with one Judge dissenting, affirmed the action of the District Court in dismissing an amended complaint on the ground that the three year statute of limitations barred the amended complaint naming appellees as defendants. The issue concerns the application of Rule 15 (c) Federal Rules of Civil Procedure, as amended in 1966 and the statute of limitations. As far as appellant have been able to ascertain, this is the first decision of this Court regarding the 1966 amendment to Rule 15 (c), above.

Appellant claimed that he was discriminated against because of color by the Pick-Congress Hotel in Chicago, Illinois in March of 1961 and that the hotel negligently lost his luggage. Appellant, by previous counsel, instituted an action in the District Court below, naming "Albert Pick Hotels" as defendant.

This action was filed in 1962.

The subsequent history of this action centered around the question of service of process which is detailed in the opinion rendered, herein, on May 19, 1969 and earlier opinions cited as Young v. Albert Pick Hotel, 115 U.S. App. D.C. 400, 320 F.2d 719 (1963), and Young v. Albert Pick Hotels, 126 U.S. App. D.C. 155, 375 F.2d 331 (1967).

It finally develpped that there was no such entity as the Albert Pick Hotels Corporation. In July of 1967, appellant, through previous counsel, filed an amended complaint naming present appellees as defendants. The District Court dismissed the amended complaint upon the ground that the Statute of Limitations barred the complaint against the newly added appellees.

A majority of the panel viewed ". . .two transactions which might be critical to this case: the making of the reservation which was dishonored, and the actual refusal to provide accommodations. . ." (page 4, slip opinion). The majority felt that a "fair reading of the original complaint indicates that the plaintiff's claim for relief, as then phrased, referred to the second occurrence." (page 4, ibid). As the amended complaint related to dishonored reservations and the transaction relevant to that claim was not sufficiently delineated in the original complaint it could not be concluded that the 1967 complaint "arose out of the conduct, transaction, or occurrence set forth. . .in the original pleading. . ." The majority felt that it need not determine "whether the remaining requirements of Rule 15 (c) are met, or whether,

if so, the plaintiff could avoid the consequences of his original defective service of process through the device of an amended complaint.

The dissenting opinion felt that the amended complaint met the requirement of Rule 15 (c) concerning the same conduct, transaction or occurrence. (page 5, slip opinion and footnote 1.). Further, the dissent noted that all defendants named are associated in the hotel business, that the same counsel has rppresented them and their interests throughout the proceedings and that one of the defendants was apprised of the proceedings from their inception. Also no prejudice is found or indicated. The dissent felt that there should be a remand for a hearing of the issue of the satisfactionoof Rule 15 (c).

Appellant submits that a rehearing should be granted on the correctness of the majority's decision in view of the dissent and the cases cited by the dissenting opinion, (slip opinion pages 5 & 6, notes 1 and 2).

Because this is a first impression case in this circuit, as far as appellant has been able to ascertain, on the 1966 amendment to Rule 15 (c), F.R.C.P., and because this case so clearly presents a factual situation by which a decision of clarification could be obtained, a rehearing en banc is suggested.

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